No. 17-71

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,

Respondent,

and

CENTER FOR BIOLOGICAL DIVERSITY and
GULF RESTORATION NETWORK,

Intervenor-Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR INTERVENOR-RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Article III's case and controversy limitation requires dismissal of a landowner's challenge to a government action that imposes no restriction on a parcel's use—either currently or "for the foreseeable future"—and whose potential effect on possible later use has been adjudged "too speculative" to support standing.

2. Whether the Fish and Wildlife Service properly determined that for purposes of the Endangered Species Act Unit 1 is "critical habitat" for the dusky gopher frog.

3. Whether the court of appeals correctly construed the provision of the Endangered Species Act regarding administrative discretion to exclude particular areas from a species' critical habitat.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. Statutory Background 2

B. The Dusky Gopher Frog 6

C. Administrative Proceedings 7

1. Listing 7

2. Critical Habitat Designation 8

D. Judicial Proceedings 12

SUMMARY OF ARGUMENT 14

ARGUMENT 18

I. Petitioner has incurred no harm sufficient for Article III jurisdiction 18

II. The Service lawfully designated Unit 1 as critical habitat for the dusky gopher frog 23

A. Unit 1 is critical habitat, as a matter of law, because it is essential for the conservation of the dusky gopher frog 24

B. Unit 1 is no less "essential" because its current state needs work before its full conservation value, as a future translocation site, can be realized 29

C. Neither does Unit 1's private ownership mean it is not essential under the Act 37

III. Section 4(a)(3) directs designation of critical habitat, without altering its definition 40

IV. Petitioner's non-textual arguments for narrowing the statute also fail 49

A. There is no policy justification for restraining the designation process Congress established 49

B. The designation raises no serious constitutional question 51

V. There is no basis for setting aside the critical habitat designation on economic grounds 53

CONCLUSION 57

TABLE OF AUTHORITIES

Page(s)

Cases

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 51

Am. Farm Bureau Fed. v. EPA.,
559 F.3d 512 (D.C. Cir. 2009) 32

Arizona Cattle Growers Ass'n v. Salazar,
606 F.3d 1160 (9th Cir. 2010) 45

Bear Valley Mut. Water Co. v. Jewell,
790 F.3d 977 (9th Cir. 2015) 27, 42, 56

Bennett v. Spear,
520 U.S. 154 (1997) 54

Buck v. Davis,
137 S. Ct. 759 (2017) 55

Davis v. Mich. Dep't of Treasury,
489 U.S. 803 (1989) 43

Digital Realty Trust v. Somers,
138 S. Ct. 767 (2018) 41

EPA. v. EME Homer City Generation, L.P.,
134 S. Ct. 1584 (2014) 49

Epic Sys. Corp. v. Lewis,
138 S. Ct. 1612 (2018) 49

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 53

In re FEMA Trailer Formaldehyde Prod. Liab. Litig.,
668 F.3d 281 (5th Cir. 2012) 32

Forest Guardians v. Babbitt,
174 F.3d 1178 (10th Cir. 1999) 51

GDF Realty Invs., Ltd. v. Norton,
326 F.3d 622 (5th Cir. 2003) 52

Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.,
378 F.3d 1059 (9th Cir. 2004) 51

Gonzales v. O Centro Espirita Beneficente U.D.V.,
546 U.S. 418 (2006) 52

Hodel v. Va. Surface Min. & Reclamation Ass'n,
452 U.S. 264 (1981) 23

Home Builders Ass'n v. U.S. Fish & Wildlife Serv.,
616 F.3d 983 (9th Cir. 2010) 35

Jennings v. Rodriguez,
138 S. Ct. 830 (2018) 49, 51

Lopez v. City of Houston,
617 F.3d 336 (5th Cir. 2010) 21

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 18, 19, 22

MacDonald, Sommer & Frates v. Yolo Cty.,
477 U.S. 340 (1986) 23

Nat. Res. Def. Council v. U.S. Dep't of the Interior,
113 F.3d 1121 (9th Cir. 1997) 56

Nat'l Park Hosp. Ass'n v. Dep't of Interior,
538 U.S. 803 (2003) 21, 22, 23

Nat'l Wildlife Fed'n v. Coleman,
529 F.2d 359 (5th Cir. 1976) 47

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 22

People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.,
852 F.3d 990 (10th Cir. 2017) 52

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 54

Sierra Club v. Froehlke,
534 F.2d 1289 (8th Cir. 1976) 47

Sierra Club v. U.S. Fish & Wildlife Serv.,
245 F.3d 434 (5th Cir. 2001) 47, 51

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016) 22

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 44

Tenn. Valley Auth. v. Hill,
437 U.S. 153 (1978) ..... *passim*

Toilet Goods Ass'n v. Gardner,
387 U.S. 158 (1967) 23

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 44

Constitutional Authorities

U.S. Const. art. I, § 8, cl. 3 52

U.S. Const. Art. III 18, 19, 20, 21, 22, 23

Statutes

5 U.S.C. § 704 55

5 U.S.C. § 706 ..... 55, 57

16 U.S.C. § 1531(a)(1) 3, 25

16 U.S.C. § 1531(b) 3

16 U.S.C. § 1532(3) ..... *passim*

16 U.S.C. § 1532(5)(A) ..... *passim*
16 U.S.C. § 1532(5)(C) 35, 47
16 U.S.C. § 1533(a)(1) 3, 4, 25, 45
16 U.S.C. § 1533(a)(3) ..... *passim*
16 U.S.C. § 1533(b)(2) 3, 4, 11, 25, 50, 54
16 U.S.C. § 1534 40
16 U.S.C. § 1536(a)(2) ..... *passim*
16 U.S.C. § 1536(e) 33
16 U.S.C. § 1537a(e)(2)(B) 44
22 U.S.C. § 6065(b) 34
33 U.S.C. § 1344 19
40 U.S.C. § 3113 40
41 U.S.C. § 7101 21
54 U.S.C. § 302105(b) 38

Rules and Regulations

50 C.F.R. § 424.12 (2012) 9, 35
43 Fed. Reg. 874 (Jan. 4, 1978) 47
59 Fed. Reg. 34,270 (July 1, 1994) 10
66 Fed. Reg. 62,993 (Dec. 4, 2001) 6, 7, 8, 30
71 Fed. Reg. 60,238 (Oct. 12, 2006) 38
73 Fed. Reg. 45,534 (Aug. 5, 2008) 35
75 Fed. Reg. 31,387 (June 3, 2010) 8, 9, 37
76 Fed. Reg. 59,774 (Sept. 27, 2011) 37
77 Fed. Reg. 71,876 (Dec. 4, 2012) 36
77 Fed. Reg. 72,070 (Dec. 4, 2012) 56
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81 Fed. Reg. 7,414 (Feb. 11, 2016) 9, 35, 36

Legislative Materials

H.R. Rep. No. 93-412 (1973) 47

Other Authorities

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BRIEF FOR RESPONDENT-INTERVENORS

INTRODUCTION

This case concerns the federal government's statutory responsibility to conserve a critically endangered species. For likely millions of years and well into the twentieth century, *Rana sevosa*—the dusky gopher frog—could be found in the ephemeral ponds and surrounding forested uplands of what is now the southern coastal United States, including on the Louisiana land the Fish and Wildlife Service designated "Unit 1." But a confluence of forces buffeted the species in the last century, reducing it to a sole population subsisting on a single Mississippi pond, one event away from final, irreversible loss.

In the Endangered Species Act, Congress directed the Service to designate "critical habitat" for every such species—at the earliest possible opportunity and based on the best science. And Congress further resolved that for imperiled species whose ranges have been curtailed, the Service must go beyond the places where the species is found at the time of listing, to include *unoccupied* areas that are "essential for [its] conservation."

On those plain terms, Unit 1 is "critical habitat," and the Service's designation was proper and lawful. It is a scientific reality that the areas designated critical habitat for the frog in Mississippi, including the unoccupied ones, leave the species with no realistic path to recovery and at genuine risk of demise from a single localized event. And it is likewise a matter of consensus that Unit 1 provides the best additional prospect for conserving the species. Its characteristics are responsive to the problems that make the other areas insufficient, and its physical features and

condition are comparable to those designated without objection in Mississippi. (It is not—contrary to petitioner's colorful but wholly unscientific insinuations—a lethal environment for the frog.)

Petitioner's proposals to read "essential for the conservation" as a *prohibition* against designating areas that are imperfect, but restorable, or are privately owned, make no sense under the Act. And petitioner's claim to have uncovered—in the provision directing prompt designations—an independent restriction on what critical habitat means is, as a textual matter, a non-starter. Nor should—or could—this Court accept petitioner's plea to impose "limiting principles" on top of the statute Congress enacted. The statutory design operated properly here. Indeed, the larger story of the critical habitat program's administration has been one of extreme agency reticence and intense congressional oversight.

This case itself illustrates the dramatic divergence between the perceptions petitioner seeks to foster and reality: For all the assertions about crushing burdens that critical habitat designations impose, petitioner has not even incurred the sort of actual, concrete injury that this Court has held is the minimum to invoke federal jurisdiction.

STATEMENT OF THE CASE

A. Statutory Background

1. The Endangered Species Act is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). In enacting the law, Congress recognized that losses from extinctions are irreversible and incalculable—that any

imperiled species could hold "answers to questions which [humanity] ha[s] not yet learned to ask." *Id.* at 178. But Congress also determined that these harms are preventable—the "trend toward" extinctions can be "halt[ed] and reverse[d]." *Id.* at 184. The Act expresses Congress's further judgment that species conservation and economic activity are compatible, so long as the latter is "[ ]tempered by adequate concern" for the former, 16 U.S.C. § 1531(a)(1), and the "best scientific data" and full range of "methods and procedures" to help species recover are employed. *See id.* §§ 1532(3), 1533(b)(2).

2. The Act charges the Secretary of Interior (and the Department's Fish and Wildlife Service) with responsibility for identifying and publicly listing all endangered fish, wildlife, and plant species, ascertaining the causes of each species' fragile status. *Id.* § 1533(a)(1). Once a species is listed, Section 9 of the Act prohibits its unauthorized "taking," by any actor, public or private, anywhere within the United States. *Id.* § 1538.

3. Section 7 of the Act imposes a further obligation, applicable only to agencies of the federal government: They must "insure," through a process of consultation with the Service, that their activities are not likely either to "jeopardize the continued existence of any endangered species" or to cause "destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." *Id.* § 1536(a)(2).

4. Section 7's separate, textual protection for critical habitat is of a piece with the Act's emphasis on the interdependence between species and broader "ecosystems," *see id.* § 1531(b), and on the significance

of habitat destruction as both a cause of extinctions and an obstacle to recovery, *see id.* § 1533(a)(1); *Hill*, 437 U.S. at 179. But when originally passed in 1973, the Act did not specify when and how critical habitat designations should occur, nor did it elaborate on what areas should be determined to be critical habitat. In 1978 amendments, Congress added new provisions to Sections 3 and 4, addressing those matters.

5. Sections 4(a)(3) and 4(b)(2) require the Service, "to the maximum extent prudent and determinable," to designate critical habitat for a species "concurrently" with its listing and to do so through notice-and-comment rulemaking "on the basis of the best scientific data available," 16 U.S.C. §§ 1533(a)(3), 1533(b)(2), "after taking into consideration the economic [and other] relevant impact" of designation, *id.* This concurrent designation regime, Congress recognized, in addition to ensuring earlier protection for biologically important and vulnerable areas, would reduce the prospect of large public undertakings' being halted midway, as the Tellico Dam had been in *Hill*, based on late-emerging species-protection concerns.

6. Section 3(5)(A) addresses which areas the Service should designate as "critical habitat," providing a two-part definition of what, "[f]or the purposes of th[e Act]," "the term 'critical habitat'" means. The first part recognizes that not every area where an endangered species is found is critical habitat. Rather, determinations for occupied areas must focus on those "specific areas" which contain "physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i).

The second part, Section 3(5)(A)(ii), codifies Congress's understanding that merely protecting the curtailed or degraded areas an endangered species currently occupies will, for many species, preclude recovery. It therefore provides that "[t]he term 'critical habitat'" also means those areas *not* occupied at the time of listing that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

7. Although Congress addressed the substance and procedures for critical habitat designations in 1978, the *effect* of designation did not change (and has not changed since). Private owners of designated lands retain all the incidents of ownership—including rights to exclude, sell, and use the land as they see fit—subject to the qualification that *federally*-supported or -authorized actions with respect to the land potentially will be subject to the Section 7 consultation process.

When such consultations do occur, the Service's opinions almost never stop or severely restrict projects, and the vast majority of consultations terminate informally. *See* Jacob Malcolm & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act*, 112 Proc. Nat. Acad. Sci. 15844, 15844-49 (2015) ("Malcolm & Li"). Indeed, a recent, rigorous study found the Service only made two formal jeopardy or adverse modification determinations in more than 88,000 consultations between 2008 and 2015, and, even then, both projects proceeded. *Id.* But as the authors also found, the interactive process often does lead the Service—or the project proponents themselves—to identify minor adjustments that have significant species conservation benefits. *Id.*

B. The Dusky Gopher Frog

1. *Rana sevosa* is an amphibian species native to pine-forested wetlands of the southern coastal states between the Mississippi River in Louisiana and the Mobile River Delta in Alabama. 66 Fed. Reg. 62,993, 62,993 (Dec. 4, 2001).

2. The frog takes its common name from its generally reclusive behavior. Like the gopher tortoise, whose burrows the frog often shares, it spends much of its life in underground refuges, which enable the frog to evade predators and to maintain the moist skin it needs for breathing and for controlling salt-water balances. *Id.* at 62,994.[1]

3. Dusky gopher frog reproduction, however, occurs in shallow ponds, where females attach fertilized eggs to vegetation and tadpoles hatch and remain until completing metamorphosis. The kinds of ponds capable of supporting the species are rare. They must be open-canopied—the absence of sunlight is believed to be life-threatening to dusky gopher tadpoles, J.A. 151; isolated from other water bodies; and "ephemeral," meaning they dry completely. J.A. 145. Moreover, the "hydroperiod" of such ponds is highly

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[1] Although the opinion dissenting from rehearing denial made light of the frog's seemingly maladaptive tendency to cover its own eyes in the presence of danger, *see* Pet. App. 125a, the species is not defenseless. Like many related species, the dusky gopher frog secretes a bitter milky substance when under threat and produces a variety of peptides that enable it to effectively combat microbial infection. Though the species' numbers are far too small to allow experimentation, such chemicals have shown significant promise for developing human therapies. *See generally* Eric Chivian & Aaron Bernstein, Sustaining Life: How Human Health Depends on Biodiversity 213-19 (2008) ("Potential Medicines from Amphibians").

specific. There must be sufficient rainfall—at just the right time—to fill ponds long enough for tadpoles to metamorphose, but not so long as to allow predatory fish populations to take hold. J.A. 151-53.

4. After breeding, mature dusky gopher frogs and successful juvenile metamorphs make their way from ponds to surrounding forested uplands, where they seek out burrows, tree stump holes, and root mounds in which to live. J.A. 150.

That relatively short journey can be perilous, especially to juveniles (which are at heightened risk of predation and desiccation, J.A. 23, 24, 150), and it can be impeded by dense brush, J.A. 157. For that reason, and others, the species benefits from the wildfires that are common in southern pine forests. Such fires pose a danger to individual frogs, but in addition to clearing the understory, they fell trees (producing additional refuges) and enrich pond and upland soils, J.A. 193 (enabling growth of plants to which eggs attach, J.A.153, 159, and ones that nourish insects the frogs eat, J.A. 149).

C. Administrative Proceedings

1. ***Listing.*** In 2001, the Service listed the dusky gopher frog as an endangered species. 66 Fed. Reg. 62,993 (Dec. 4, 2001).[2] At the time of listing, the population on Glen's Pond in the DeSoto National Forest, estimated at 100 adult frogs, was believed to be the only remaining one. *Id.* at 62,994-95. In

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[2] The Service had initially identified the frog as a "distinct population segment" of a different species and referred to it as the "Mississippi gopher frog," but it later determined, after substantial scientific input, that *Rana sevosa* and "dusky gopher frog" are the correct taxonomy and nomenclature. J.A. 101-02.

subsequent years, small numbers of breeding pairs and egg masses were found on three other ponds, *see* J.A. 148, but the Glen's Pond population remains the only established breeding population, accounting for 135 of the 160 frogs estimated to be alive in the wild in 2015. U.S. Fish and Wildlife Serv., 5-Year Review: Summary and Evaluation 8 (2015) ("5-Year Review").

The Service identified habitat curtailment and degradation as a central cause of the species' endangerment and a principal obstacle to its prospects for recovery—and survival. 66 Fed Reg. at 62,997. Both ephemeral ponds and surrounding pine forests have been destroyed or compromised by human activities such as urbanization, flood control, agriculture and timber harvesting—and attendant efforts to suppress wildfires. *Id.* at 62,998-99. The Service recognized that the species' small population size and geographic concentration as an independent danger. *Id.* These can cause inbreeding and loss of genetic diversity, reducing individual fitness and the species' capacity to adapt to new threats, and made the frog vulnerable to "random demographic events." *See id.*

The Service did not designate critical habitat for the dusky gopher frog at the time of the 2001 listing, citing budgetary constraints, 66 Fed. Reg. at 63,000, and undertook to do so in 2010, as a result of a suit brought by respondent-intervenors. *See* 75 Fed. Reg. 31,387, 31,389 (June 3, 2010).

2. ***Critical Habitat Designation.*** The Service initially proposed to designate 385 acres currently occupied by the frog and 1,572 unoccupied acres, all in and around the DeSoto Forest. 75 Fed. Reg. at 31,395. In selecting these areas, the Service, consistent with

its then-governing regulations, 50 C.F.R. 424.12 (2012), identified three "primary constituent elements" ("PCEs") of dusky gopher frog habitat, derived from research on the Glen's Pond population and studies involving related species: (1) ephemeral ponds, (2) upland forest, and (3) suitable areas connecting the two. *See* 75 Fed. Reg. at 31,391-94. The Service further highlighted the special importance of multiple breeding ponds in close proximity to one another, as a "metapopulation structure" would enable individuals to move between ponds, improving genetic variation and species resilience. *Id.*[3]

The designation proposal recognized that the eleven Mississippi sites the Service had identified were not in turn-key condition. Rather, at the time of listing (and of the 2010 proposal), each area required active management to benefit the recovery of the frog. 75 Fed. Reg. at 31,393. In particular, the Service explained that several sites had been chosen based on their "restoration potential" and reported that "[h]abitat restoration efforts" to date "ha[d] been successful in establishing at least one of the PCEs on each of the[] sites" it proposed. *Id.* at 31,389, 31,394.

a. Pursuant to longstanding agency policy, the proposal was distributed to peer reviewers—independent scientists with expertise in conservation

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[3] The Service described these "elements" largely as a gloss on the "physical or biological features" language of the Section 3(5)(A)(i) definition applicable to occupied areas. 75 Fed. Reg. at 31,389-91. In a subsequent rulemaking, the Service, citing persistent confusion about the significance of the non-statutory PCE concept, decided to jettison it. *See* 81 Fed. Reg. 7,414, 7,426 (Feb. 11, 2016). Those regulations are not currently in force, on account of a recent settlement agreement whereby the Service pledged to "reconsider" them. *See* Petr. Br. 11 n.7.

biology, amphibian species, and the dusky gopher frog particularly. *See generally* Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities, 59 Fed. Reg. 34,270 (July 1, 1994).

These scientists proved "united in their assessment" that the Mississippi units were "inadequate for the conservation of the dusky gopher frog." J.A. 124. In particular, they expressed concern about concentrating recovery efforts in one single area in Southwest Mississippi. *See, e.g.*, J.A. 52-53 (Pechmann). Doing so would leave the species vulnerable to serious threats—from invasive species, drought, and disease—that are "likely to occur at the same time at sites near each other." J.A. 125. In fact, disease had caused a "mass die-off" of tadpoles at Glen's Pond in 2003, 5-Year Review at 16; and in 8 of the 15 breeding seasons between 2001 and 2015, rainfall there was insufficient for any tadpole to reach maturity. *Id.* at 21. The peer reviewers urged the Service to look elsewhere within the species' historical range. J.A. 124.

b. The Service returned then to the field, conducting reassessments in Alabama and Louisiana. *Id.* The "primary focus of [the] reanalysis" was to identify "open-canopied, isolated, ephemeral ponds"—on account of their "rarity" and singular "importance to survival of the species." *Id.*

The ponded areas in Alabama that the Service identified using remote sensing and aerial photography proved to be "poor habitat" on closer examination—they contained fish and woody shrubs and were no longer surrounded by forests. J.A. 127-28.

The Service accordingly declined to designate them. *Id.*

Turning to Louisiana, the Service examined Unit 1, privately owned forest currently used for petitioner's commercial timber harvesting operations and the site of the pond on which the species was last seen in that state. J.A.124. Ultimately, the agency determined that the area has five ephemeral ponds that are fully intact and include "an open canopy with emergent herbaceous vegetation for egg attachment." J.A. 122, 153. Indeed, "[b]ased on the best scientific information available," these ponds, close enough together to promote metapopulation structure, were found to "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." J.A. 125.

In addition to its unique combination of rare pond quality and proximity, the area contains adjacent upland pine forest habitat that, though densely grown, "retains some stump holes and could be restored to suitable upland habitat for *R. sevosa*." AR1568 (Pechmann peer review comment); *see also* AR6744-45 (photos of Unit 1 burrows).

c. The Service also considered the economic impact of its designations. *See* 16 U.S.C. § 1533(b)(2).

With respect to Unit 1, the analysis recognized the critical habitat designation would have no effect on petitioner's timber harvesting and that there was substantial uncertainty as to whether, if at all, designation might affect any future development activity. Petitioner (and the landowners) would be unaffected by the designation if their development activity did not require federal action, such as a Clean Water Act permit; or if a permit process did not trigger

a Section 7 consultation or such consultation did not impair the redevelopment. J.A. 68. In addition to these zero-cost scenarios, the analysis considered the losses owners could incur if the hypothetical consultation pared back redevelopment partially or entirely, estimating these costs at $20.4 and $33.9 million, respectively. J.A. 68-69.

The analysis doubted petitioner's claims of unique value for the particular parcel, noting that St. Tammany Parish had 300,000 acres of developable land, some 43,000 of which were property of Unit 1's owners. J.A. 54, 87. And it further noted, but did not quantify, the significant non-species benefits of critical habitat designations, including increases to the value of nearby property. J.A. 97-98.

d. The 2012 Final Rule designated critical habitat for the dusky gopher frog consisting of 6,477 acres, of which 3,501 are federal lands, 264 are state-owned, and 2,711 are privately owned (of which Unit 1 accounts for 1,544). J.A. 166. The Service concluded that the potential benefits of excluding Unit 1 from designation, when compared to the biological and non-biological benefits of designation, did not warrant exercise of its discretionary exclusion authority. J.A. 190.

D. Judicial Proceedings

1. Petitioner and two groups of landowners filed three separate lawsuits challenging the designation of Unit 1 on statutory and constitutional grounds. The suits were consolidated by the district court, which granted respondent-intervenors' motion to intervene. Pet. App. 89a. The district court refused to dismiss for lack of standing, *id.* 95a, but upheld the critical habitat designation on the merits, *id.* 99-122a.

2. On appeal, petitioner disclaimed any disagreement with the Service's scientific judgments concerning the plight of the species, the need for additional out-of-state breeding populations, or the singular character of the ponds on Unit 1; and it endorsed the Service's conclusion that "it is easier to restore terrestrial habitat than to restore or create breeding ponds," C.A. Br. 36. Petitioner maintained, however, that the Service's determination that Unit 1 is "essential for the conservation" of the frog was arbitrary and capricious, given the land's current use and the owners' stated unwillingness to allow reintroduction or undertake restoration measures. *Id.* 24-41. Petitioner further argued that if the Act were construed to authorize this designation, it should be held unconstitutional. *Id.* 44-51.

3. The Fifth Circuit affirmed the district court's judgment, holding that petitioner had standing to sue, but that its substantive challenges lacked merit. Pet. App. 47a. As to jurisdiction, the court recognized that petitioner's claims of "lost future development" were "too speculative" for Article III, *id.* 12a, but that its claims of reduced property value were legally sufficient, *id.* 13a. On the merits, the court held that the Service had lawfully concluded that Unit 1 falls within the statutory "critical habitat" definition, *id.* 21a-32a, and that the designation did not violate the Commerce Clause, *id.* 32a, 44a. It then held that the Service's decision not to exercise its authority to exclude Unit 1 from designation on economic grounds was not subject to judicial review. *Id.* 36a.

Petitioner sought en banc rehearing, again emphasizing that the statutory definition controlled, but renewing its contention that the Service's

interpretation of "essential for the conservation of the species" was insufficiently stringent. Pet. Rh'g En Banc 7-9. The court of appeals denied rehearing, but Judge Jones's opinion dissenting from that denial advanced a different theory than the one pressed by petitioner and the panel dissent. The opinion faulted the Service not for its interpretation of the statutory definition but rather for neglecting a "habitability" requirement implicit in Section 4(a)(3), which describes the Secretary's concurrent designation obligation as reaching "any *habitat* of such species which is then considered to be critical habitat." *Id.* 132a (quoting 16 US.C. § 1533(a)(3) (emphasis added)).[4]

SUMMARY OF ARGUMENT

I. Although the decision below was unassailably correct on the merits, the court erred in concluding that petitioner's case cleared the jurisdictional threshold. For all its lamentations about oppressive costs, petitioner has not suffered the concrete injury-in-fact that Article III requires. The critical habitat designation does not restrict the activity that petitioner pursues now on Unit 1 and intends to for the "foreseeable future"—cultivating and harvesting timber commercially. And it is wholly speculative, indeed quite *un*likely, that the designation will actually impair the landowners' ability to profitably redevelop the land at some undetermined future time.

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[4] The dissenting opinion acknowledged that petitioner had not advanced this argument—its briefs twice quoted Section 4(a)(3) and both times replaced the word "habitat" with "lands," *see infra*, p. 42. But Judge Jones posited that the omission—which she ascribed to unspecified "tactical reasons," Pet. App. 138a—should not preclude deciding the case on this basis, *id.* 132a.

The mere fact that a hypothetical buyer might take account of these same remote contingencies does not transform constitutionally inadequate potential future harm into actionable present injury.

II. On the merits, this case turns on what the Endangered Species Act's critical habitat provisions require—and what they forbid—with respect to the dusky gopher frog. Congress required the Service to designate "critical habitat" for every endangered species, and no one denies that that obligation extends to areas, like Unit 1, that the species long inhabited but no longer does. Nor is there any ambiguity as to the substance of that obligation: When a not-occupied area is "essential for the conservation of the species," it is considered "critical habitat" for purposes of the Act and must be designated as such.

This clear and express directive and the legislative judgments on which it rests control this case. On any sensible reckoning, Unit 1 is "essential for the conservation" of the dusky gopher frog. Whatever aspersions petitioner casts on Unit 1, it is a matter of scientific consensus that relegating this species to the areas designated in Mississippi (including unoccupied areas designated there) would leave the species at risk of extinction and would doom its recovery prospects. Unit 1 was selected because its characteristics are responsive to these urgent conservation needs. Petitioner has never refuted or even seriously contested these scientific judgments, nor claimed that the Service was wrong to adjudge Unit 1 the most promising habitat for the species within its historic range.

Unable to claim that Unit 1 is not essential in the ordinary sense, petitioner purports to deduce two

other prohibitions from the statutory definition. First, eliding the difference between an environment that is deadly to a species and one that is suboptimal, petitioner proposes that Section 3(5)(A) prohibits the Service from designating anything but turn-key-ready unoccupied habitat.

That is not what "essential" connotes in ordinary parlance, and it is surely not what "essential for the conservation of the species" means under the Endangered Species Act. The text of Section 3(5)(A), considered in light of its place in the overall statutory scheme, leaves no doubt that urgently needed, reasonably restorable habitat may—and, in the circumstances here, must—be designated. Nor, contrary to petitioner's suggestions, may the mandate to designate essential areas permissibly be construed to mean such areas cannot be designated if under private ownership. Congress did not limit the critical habitat program to federal lands either directly or indirectly, by somehow making federal acquisition a precondition of designation. The Act's unitary approach to "critical habitat" reflects both the common-sense reality that an area's biological significance and its ownership status are separate matters and Congress's recognition that the Act's species and habitat conservation programs could and should operate within the context of private ownership and economically productive land use.

That leaves petitioner to argue that Congress in some other way forbade the Service to designate Unit 1, or that the Court should impose a restriction that Congress did not:

III. Petitioner's central submission here is that critical habitat does not mean what Section 3(5)(A)

says "the term" "means" "[f]or the purposes of" the Act—specifically that "habitat . . . considered to be critical habitat" in Section 4(a)(3) means something different from—and more restrictive than—"critical habitat." But the plain text and structure of the Act foreclose that theory. They instead show that the ostensibly game-altering provision can only mean what *petitioner said* it does in its court of appeals briefing: that the Service must designate lands that meet Congress's critical habitat definition, as promptly as possible. Accepting petitioner's purportedly "textual" proposal would make a hash of an integrated statutory regime that has operated coherently since its enactment four decades ago.

IV. As for petitioner's argument that a further restriction must be imposed for policy reasons, this Court has no such legislative authority. The statutory regime that Congress enacted, which requires designations to proceed by regulation, species-by-species, and area-by-area already provides a welter of legal, scientific, procedural, and judicial checks which together ensure against overreach in the Service's discharge of its designation responsibilities. Were these controls in any way deficient, the *political* checks on the Service's authority are notoriously potent. That is why critical habitat designations have, for decades, been a chronically under-enforced component of the Act's species conservation program.

V. Nor do petitioner's appeals to the "presumption of reviewability" offer a path to reversing or even remanding the Unit 1 designation. Non-exclusion is part-and-parcel of the decision to designate, and both courts reviewed *that* action. Petitioner's case would come out no differently even if the Court *could* review

the Service's cost-benefit analysis: The Service refused to exclude an area it had—properly and lawfully—determined to be essential for the species' survival; and, bluster aside, there is a significant likelihood that the economic cost of designation (and non-exclusion) is zero. But the decision below was correct to refuse the kind of review petitioner pursues here in any event. This Court long ago recognized that the judiciary's power to review critical habitat designations does not extend to setting them aside on economic grounds. Nor may courts do that through the backdoor, in the guise of reviewing the agency's choice to *not exercise* its discretion to exclude.

ARGUMENT

I. Petitioner has incurred no harm sufficient for Article III jurisdiction.

1. Petitioner has not shown the "irreducible constitutional minimum" to invoke the jurisdiction of a federal court: an "injury in fact," which is both "concrete and particularized," and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). At the time it filed suit, petitioner was using Unit 1 to harvest timber under a lease that is in effect until 2043, and petitioner has expressly represented its intention to continue doing so for the "foreseeable future." C.A. Br. 7-8 & n.25. And it is indisputable that the regulation designating Unit 1 as critical habitat has no effect on petitioner's right to do that. *See* Petr. Br. 44.

Petitioner's claims of injury instead depend on what could possibly occur when (and if) the landowners undertake to redevelop this part of their property for

residential and commercial use. In that event, petitioner maintains, it is *possible* that a "dredge-and-fill" permit under the Clean Water Act would be necessary, *see* 33 U.S.C. § 1344; which *might* then lead to an inter-agency Section 7 consultation concerning adverse habitat modification; which *could* result in the identification of modifications that *might* lead to the land's being developed less profitably than it otherwise would.[5]

The decision below properly held this impairment-of-future-development-theory "too speculative" to constitute actionable imminent injury. Pet. App. 12a. A stated intention to do something at some unspecified juncture—beyond the "foreseeable future," C.A. Br. 8—"when market conditions are amenable," J.A. 80, is precisely the sort of "'some day' intention[]" this Court has held cannot suffice under Article III. *Lujan*, 504 U.S. at 564.

But even if the redevelopment effort were concrete and impending, petitioner's future injury claim would still entail piling contingency upon speculation. Petitioner (unsurprisingly) has never squarely alleged, let alone established, that a federal permit would be required in order to proceed with redevelopment. (Nor has it established that a permit would be forthcoming in the absence of Endangered Species Act considerations, which implicates the *other* Article III requirements—causation and redressability.)

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[5] Petitioner represents that it is primarily the lessor and "operator" of Unit 1, though it apparently owns some 152 acres there. Pet. App. 88a. This discussion does not depend on the distinct complexities raised by petitioner's asserting the rights of the predominant owners.

And petitioner has not established—nor could it—that a significant project modification is the "reasonably likely" outcome of the consultation the (hypothetical) permit application would trigger. On the contrary, government data show that the sort of outright prohibitions about which petitioner thunders essentially never happen, and that even substantial restrictions are a vanishingly rare exception. *See* Malcolm & Li at 15846 (finding that no project was "stopped or extensively altered" in the 88,290 consultations between 2008 and 2015).

But even then, it is entirely uncertain that a proposed species-protective modification would actually adversely affect the project's bottom line. As the Administrative Record in this case attests, a large planned residential community was built adjacent to Glen's Pond, and a Biological Opinion for that development determined it would not jeopardize the dusky gopher frog, noting the developer's agreement to avoid construction on a narrow strip of land immediately adjacent to the pond. AR4574, 4582. Given that Unit 1 comprises a small fraction of the landowners' 45,000-acre portfolio in St. Tammany Parish, J.A. 54, there is a substantial likelihood that their development project could proceed likewise, with modest but meaningful species-protective adjustments.

The uncertainty of *any* hindrance of any not-yet-begun redevelopment is reflected throughout the economic analysis, which "estimated" the impact of critical habitat designation to be anywhere from $0 to $33.9 million. J.A. 67. (The analysis recognized, but made no effort to quantify, offsetting economic *benefits* that can accrue to private developers. J.A. 97-

98.) Such uncertainties defeat petitioner's ability to establish the imminent injury that standing requires.

2. Regrettably, the Fifth Circuit held this very same remote and contingent risk of future injury to be *sufficient* for standing, when reflected in a claimed market valuation. Pet. App. 13a. But Article III limitations do not permit plaintiffs to transform conjectural future harms into actionable, concrete injuries simply by positing that a hypothetical purchaser would pay more for a property were there no risk of future regulation. This Court rejected such an attempt in *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 811 (2003). There, the petitioner contended that uncertainty as to the applicability of the Contract Disputes Act, *see* 41 U.S.C. § 7101 *et seq.*, caused its members real harm because potential concessioners would take account of the uncertainty by lowering their bids. 538 U.S. at 811. The Court held that "mere uncertainty as to the validity of a legal rule" could not constitute a "hardship for purposes of" Article III's ripeness requirement. *Id.*[6] Were it otherwise, this Court reasoned, "courts would soon be overwhelmed with requests for what essentially would be advisory opinions because most business transactions could be priced more accurately if even a small portion of existing legal uncertainties were resolved." *Id.*

Petitioner's claims—that a hypothetical purchaser would incorporate the uncertainty arising from a critical habitat designation into an offer to buy Unit

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[6] As courts regularly recognize, there is no substantive difference in these circumstances between Article III's "hardship" (ripeness) and "concrete injury" (standing) requirements. *See, e.g., Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010).

1—are no different. *See* Pet. App. 13a. Indeed, unlike the challengers in *NPHA*, who were making bidding decisions—and, by hypothesis, suffering actual hardship as a result of the uncertainty—petitioner has never claimed any concrete intention to sell its 152 acres or that it would have done so absent the challenged designation.

To be sure, the regulation here, unlike the one challenged in *NPHA*, is directed at Unit 1, and this Court has said that injury is more readily established when the plaintiff itself is "an object of the [challenged] action," *Lujan*, 504 U.S. at 561-62. But that observation bears only on particularity, and the Court has "made it clear time and time again that an injury in fact must be both concrete *and* particularized." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Even where a plaintiff can show violations of "his [own] statutory rights," dismissal is required if the violations "result in no harm." *Id.* at 1548, 1550.

That does not mean that a property owner need allege an intent to sell in order to challenge an actual land use restriction—or that decreased market value is not a permissible measure of damages. But in such cases, the government action has directly—and definitively—impaired a significant component of the plaintiff's ownership rights. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001). Here, the Service has not asserted "jurisdiction" over Unit 1, Markle Br. 37; the landowners have the same rights of use and exclusion they enjoyed before designation. Were petitioner's actuarial approach to prevail here, the uncontroversial justiciability rules for property regulation cases would be a dead letter: The "market"

can always be expected to value a parcel that might (but might not) be developable with a zoning variance less than one that may be developed as of right. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (claim is not ripe until challenger has unsuccessfully sought a variance).

3. Even if petitioner's showings satisfied the minimum injury requirements for standing, dismissal, on Article III ripeness grounds, would be warranted. *See NPHA*, 538 U.S. at 808 (federal courts may consider ripeness on their "own motion"). When as here, a government action cannot affect what a would-be challenger does and intends to do for the foreseeable future, there is no "hardship" in withholding immediate adjudication. *Id.* And there are clear benefits to withholding consideration here. It is entirely possible that the various contingencies on which petitioner's claim depends will never materialize. At the very least, a court's consideration of petitioner's claims of millions of dollars in losses—not to mention its intimations of "constitutional doubt"—will "stand on a much surer footing," *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967), if it occurs in the context of an actual permit application or consultation. *Cf. MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.").

II. The Service lawfully designated Unit 1 as critical habitat for the dusky gopher frog.

This case is about what Congress required and what it prohibited in critical habitat designations. Congress unambiguously defined what "critical habitat" means under the Act, and that clear and

express definition describes Unit 1 to a T. It is a matter of scientific consensus that additional areas outside ones currently occupied by the species are urgently necessary—"essential"—and that Unit 1 is, in its current condition and subject to the sort of restoration practices pursued in the other designated units, singularly responsive to the conservation imperatives of this imperiled species.

A. Unit 1 is critical habitat, as a matter of law, because it is essential for the conservation of the dusky gopher frog.

1. There is no ambiguity as to what the Service must consider "critical habitat" for a particular endangered species. In Section 3, Congress directly and specifically spoke to what, "[f]or the purposes of" the Act, "[t]he term 'critical habitat' . . . *means*." Those:

> (i) specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; *and* (ii) specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. §§ 1532, 1532(5)(A) (emphasis added).

The import of that provision is plain. For starters, Congress's specific reference to "areas outside the geographical area occupied by the species" leaves no doubt that the Service's critical habitat designations are *not* to be confined to areas where an endangered species is currently or ordinarily found. Thus, whatever the phrase "critical habitat" might otherwise

connote, as used throughout the Act, the term extends fully to areas the species does not currently occupy.

Other provisions of the Act make equally plain the logic underlying that directive. First, Congress committed to conserving every endangered fish, wildlife, and plant species—with "conservation" meaning "the use of all methods . . . necessary to bring" each listed species back "to the point at which" statutory interventions are "no longer necessary." 16 U.S.C. § 1532(3). Moreover, Congress recognized that "curtailment," "modification," and fragmentation of habitat was, for many extinct species, the primary cause of loss, and the most serious threat to surviving but endangered species. *See id.* §§ 1531, 1533(a)(1); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978). Together, these commitments compel the conclusion that the Service may not allow a species to further decline *because* these forces have relegated it to inadequate habitat. And Congress specified that scientific judgments are paramount—albeit ones based on the best "data *available*," 16 U.S.C. § 1533(b)(2) (emphasis added), reinforcing that, for matters the Act addresses, time is of the essence.

Congress's carefully considered definition does not leave the Service unguided in discharging its responsibility to designate unoccupied areas. The Act specifies that any such area be "essential for the conservation of the species" at issue, and the term "essential" is, as petitioner says, readily understood to mean "absolutely necessary [or] indispensable" or "important in the highest degree." *See* Petr. Br. 28 (quoting dictionaries).

Thus, the provision's affirmative thrust is that critical habitat *must* be designated, promptly, when

an area is truly necessary to address some conservation imperative for a species. But it also means that the Service should refrain from designation when a particular unoccupied area is *un*important or *un*necessary or dispensable—or when conservation is not really at stake.

2. This plain meaning of the express definition, together with the statutory judgments it implements, establish the correctness of the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. First, preventing extinction is truly of utmost importance under the Act. A species cannot be conserved unless it survives. And survival is the current and most realistic goal for the dusky gopher frog. 5-Year Review at 5. There are "only up to a few hundred individuals of the species in the wild," J.A. 39 (Richter), and, given the forces arrayed against it, the species' survival to date is a matter of statistical good luck, *see* J.A. 157, along with intense human effort—including extensive habitat restoration. J.A. 161-62.

Nor is there dispute as to what is necessary to halt and reverse the species' perilous state: The establishment of additional breeding populations. "Recovery of the dusky gopher frog will not be possible" without that. J.A. 125. And no one, including petitioner, disputes what that requires: Open-canopied, ephemeral ponds—supportive of metapopulations, J.A. 157-58, outside Mississippi, but within the species' historical range—are "absolutely necessary," J.A. 39 (Richter), both to stave off catastrophic near-term harm and put the species in position to recover. J.A. 125-26.

The Service designated Unit 1 as critical habitat because it directly and uniquely responds to these

needs: Its five intact ponds provide breeding habitat superior to any of the Mississippi sites. J.A. 125-26. It is within the historic range, but far enough from Mississippi to hedge against stochastic events. *Id.*[7]

In designating, neither the Service nor the independent outside reviewers succumbed to the "more is better" thinking and pond-focused tunnel vision petitioner would impute to them. The same scientists and decisionmakers who recognized Unit 1 as essential concluded that none of the more than 60 ponded areas considered in the Alabama historic range should be designated, based, in some instances, on the condition of their surrounding areas. J.A. 127-28, 159. And when the leading expert on the species concluded that Unit 1 is "the best gopher frog habitat remaining in Louisiana," J.A. 53 (Pechmann), he did not believe it was turn-key ready or optimal in all respects. Rather, he and others recognized that the basics were present and that Unit 1 was, in their judgment and based on experience in Mississippi areas, restorable. J.A. 167.

3. For its part, petitioner has never claimed that any *other* area is better or comparably suited to the

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[7] The landowner parties treat this virtue as a vice, arguing that Unit 1 cannot be critical habitat because it is not adjacent to an occupied area—not close enough that a Glen's Pond frog could "reach Unit 1 on its own." Markle Br. 11. In some instances, adjacency makes an unoccupied area essential—for instance, where it contributes sediments needed to support an endangered downstream fish population, *see Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015). But the conservation needs of this species make *non*-adjacency critical. As for the commute, the Act does not contemplate species' conserving themselves. Among the "methods" it enumerates are "propagation, live trapping, and transplantation." 16 U.S.C. § 1532(3).

species' conservation needs. Nor has it contested the factual and scientific findings underlying the designation. In the court of appeals, petitioner expressly endorsed the Service's findings about the physical characteristics and biology of the breeding habitat on Unit 1. C.A. Br. 36. Indeed, petitioner did not deny that "it is easier to restore terrestrial habitat than to restore or create breeding ponds." *Id.* And petitioner has not heretofore disputed the sobering reality that extinction is an ever-present risk for this species—and a much higher one were conservation to be pursued only on the sites designated in Mississippi.

To the extent petitioner attempts now to walk away from these conceded scientific realities, it hardly advances its cause. First, any implication that the species' plight is significantly less dire than the 2012 rule described, *see* Petr. Br. 15, 39, 44, is folly. The source from which petitioner extracts its snippets of upbeat news ultimately concludes there is no realistic prospect of the frog's achieving even "threatened" status in the foreseeable future, 5-Year Review at 5—and that extinction is still a likely prognosis. *Id.* at 3, 21. Still more misconceived is petitioner's attempt to minimize the biological significance of isolated ephemeral ponds. True, dusky gopher frogs spend only "8 to 17" days of the year in them. Petr. Br. 24. But no herpetology expertise is needed to see the fault in this logic: From a species-survival perspective, *breeding* is an especially important process. That a person spent only 6,720 hours *in utero*, as opposed to 110,000 lifetime hours watching television (as the average

American is estimated to), is hardly evidence of secondary importance.[8]

B. Unit 1 is no less "essential" because its current state needs work before its full conservation value, as a future translocation site, can be realized.

Rather than claim that Unit 1 is inessential in the ordinary sense of the term—*i.e.*, that the need is not great or there is some alternative way of advancing the species' conservation—petitioner argues that "the best gopher frog habitat," J.A. 53 (Pechmann), is disqualified because it is not *good enough*. That argument invites the Court to conflate two propositions—(1) that an area that is *lethal* to a species cannot be "essential for [its] conservation" and (2) that an area that is imperfect, but restorable, cannot be. The first is irrelevant to this case. The second is plainly contrary to the statute.

1. Petitioner's attention-grabbing assertions that Unit 1 is unlivable in some absolute sense—the way a "desert" could not be unoccupied critical habitat for "a fish"—should not distract the Court. Pet. 18 (quoting Am. Br. Ala. et al., in Support of Rh'g En Banc 3).

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[8] Nor does the news about other ponds warrant petitioner's enthusiastic account: The source petitioner cites estimates that Glen's Pond accounted for 135 of the 160 adult frogs living in the wild in 2015, 5-Year Review at 8-9, and breeding events at the others have been in single digits or zero in most years. *See id.* (breeding at Mike's Pond occurred in four of 11 years; no frogs heard at McCoy's Pond since 2004). Experience similarly refutes the suggestion that the problem of artificial ponds has been solved. Efforts to engineer such ponds have been ongoing since 2002 yet have not produced a single stable breeding population.

a. To begin, actual experience in Mississippi rules out any suggestion that a frog "would immediately die if moved [to Unit 1]." *Id.* When the dusky gopher frog population was discovered on Glen's Pond in the 1980s, the surrounding area was under active timber management, which included clear-cutting and fire suppression. *See* 66 Fed. Reg. 62,993, 62,997 (Dec. 4, 2001). The frog's "continued occurrence" under these conditions led the Service to conclude (long before Unit 1 was in dispute) that "[t]imber management that avoids adverse effects to important habitat characteristics *is compatible with* maintenance of the [dusky] gopher frog." *Id.* (emphasis added).

b. Nor is the analogy to Glen's Pond required. It is a fact that, for at least six decades in the twentieth century, the dusky gopher frog persisted on Unit 1 itself, notwithstanding ongoing commercial harvesting of loblolly pine, including for twelve years under the timber lease that petitioner holds. *See* AR5812. No "fish in the desert" would survive for twenty generations. (Indeed, it is not certain that the species was gone even in 1965; before 1987, the frog had for years evaded observation in Mississippi, despite dogged efforts to locate it there.)[9]

c. The fact that the frog survived at both sites attests to the hazards of the kind of casual and unscientific claims about particular habitat elements

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[9] The Louisiana Department of Wildlife and Fisheries has designated the species a state endangered species and classified it as "SH," meaning "possibly still persisting"—in St. Tammany Parish—rather than "SX," "believed to be extirpated from Louisiana." *See Species by Parish List* https://tinyurl.com/ybxcm93q.

on which petitioner's claims depend. Both oxygen and pomegranate juice can be described as life-sustaining, but that does not mean one should fret about going without the latter for five or ten minutes. So too for the frog. Open-canopied uplands—unlike open-canopied ponds, J.A. 151—appear not to be a life-or-death matter.[10] Likewise, while long-leaf pine forests are the species' historic habitat and "preferabl[e]" to other pine species, J.A. 155, there is no basis for suggesting that loblolly pines are in themselves lethal. Nor, of course, is "fire-suppression" an inhospitable *physical feature* of an area. It is a human intervention—one that, by definition, is undertaken where fire would otherwise be *present*. And unlike with paving over of an ephemeral pond, degradation from past fire suppression can be reversed through prescribed burning.[11]

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[10] Because relatively little is yet known about the dusky gopher frog—and what is known derives from studying the single Glen's Pond population, J.A. 151, the Service's final rule relied heavily on studies of a closely related species, *Rana capito*. J.A. 109. That species has been documented on ponds whose surrounding uplands include fire-suppressed, closed-canopy pines. *See, e.g.*, AR1412 (Elizabeth A. Roznik & Steve A. Johnson, *Burrow Use and Survival of Newly Metamorphosed Gopher Frogs* (Rana capito), 43 J. Herpetology 431 (2009)). While juveniles in that study were found to *prefer* open-canopied areas, those who migrated to areas containing closed-canopy pine uplands not only survived, but survived at higher rates than juveniles migrating to one fire-maintained area—a result the researchers suggested might be attributed to the frogs' predators *also* preferring open-canopied habitat. *Id.* at 434-36.

[11] While petitioner raises the specter of "frequent fire[]," Petr. Br. 16 n.10, prescribed burning is a management tool, which achieves the soil-enhancing and other benefits of wildfires while avoiding the perils. It has been practiced in the DeSoto National

2. Once the dense thicket of imprecision and embellishment is cleared away, the dispositive legal question comes into focus: Did Congress, in *requiring* the Secretary to designate unoccupied areas that are "essential" thereby *prohibit* designating areas that are flawed, but restorable? The plain text of Section 3(5)(A) and the thrust of numerous other provisions foreclose any such suggestion.

a. As a matter of ordinary understanding, whether something is optimal and whether it is essential are different matters. Indeed, the suboptimal is commonly accepted *because* it is essential. In the face of urgent necessity, the least-imperfect alternative is chosen, lest the "best [be] an enemy of the good." *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 528 (D.C. Cir. 2009); *id.* (declining to vacate a rule held to be legally inadequate, lest the court "sacrifice such protection as [the rule] now provides"). In the event of major natural disasters, people are re-located to travel trailers and even sports arenas. *Cf. In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, 668 F.3d 281, 289-90 (5th Cir. 2012).[12]

b. Congress surely did not intend for the perfect to defeat the good in *the Endangered Species Act*. In light of the specific judgments codified in "every section of

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Forest for decades, without adverse effects on silviculture or residential occupation, at a "frequen[cy]" of approximately once every four years. AR000892.

[12] Indeed, petitioner's litigating stance is predicated on the notion that certain features of the parcel, including its highway proximity and elevation—given that "hurricanes" and "flooding" are "inevitable," Petr. Br. 33—make it well suited for residential occupancy, notwithstanding the current absence of infrastructure and presence of dense loblolly pine.

the statute," *Hill*, 437 U.S. at 184, it is unimaginable that Congress, through enactment of the word "essential"—or any other, *see* Part III, *infra*—required that the Service, if faced with a choice between designating a promising, restorable unoccupied area and relegating an ebbing species to its manifestly inadequate, curtailed range, take the latter course.

On the contrary, multiple provisions of the Act establish the opposite: that currently imperfect, restorable habitat is integral to the program that Congress designed. First, species extinction is not just another consideration under the statute; it is a harm that must be resisted "whatever the cost," *Hill*, 437 U.S. at 184, making it implausible that Congress would prohibit designating less-than-perfect areas in circumstances like this.[13]

Second, Congress made explicit that "conservation," a constituent term in the Section 3(5)(A)(ii) "critical habitat" definition, means use of "all methods and procedures" necessary for recovery, including a lengthy but non-exhaustive list of such active interventions. *See* 16 U.S.C. § 1532(3). That is the opposite of directing the federal government simply to take a hands-off approach to pristine, optimal areas. This directive, in turn, comports with the recognition, at the heart of the Section 7 consultation regime, that many endangered species are not found in pure wilderness, making careful

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[13] In the 1978 amendments, Congress took a modest step away from this literally unqualified mandate. But its chosen mechanism, the cabinet-level committee, *see* 16 U.S.C. § 1536(e), has only twice used its authority to approve federal action found likely to jeopardize a species.

accommodations of conservation and other values imperative.

Third, the text of the definition addressing *occupied* areas further belies the premise that Congress meant to limit the critical habitat efforts to only the very best land. That provision's conjunctive language directs the Service's focus to areas with valuable "physical biological features" which *also* require "special management considerations." 16 U.S.C. § 1532(5)(A)(i).

3. Petitioner attempts to deploy the two-part definition in an entirely different way. *See* Petr. Br. 27-28. It proposes that the Court (1) read the occupied areas language as requiring that each "specific area[]" currently contain all biologically important features and (2) then read the unoccupied areas definition as if it says: "*In addition to the requirements of Section 3(5)(A)(i)*, [the] specific areas outside the geographical area occupied by the species . . . [must be] essential for the conservation of the species," such that the absence of any single feature precludes designation.

That is wrong. Congress often writes statutes that way. *See, e.g.*, 22 U.S.C. § 6065(b) (identifying factors "[i]n addition to the requirements in subsection (a) of this section" that must be "take[n] into account"). But it did not do that here. Instead, Congress enacted the two-part definition using distinctly different substantive language in the two adjacent sentences.

There is nothing "perverse," Petr. Br. 35, about reading the definition—both components—in accord with Congress's chosen language. In fact, the two parts respond to two different situations. In its first part, Section 3(5)(A)(i) principally addresses, for species *with* sufficient useful habitat at the time of

listing (for example, ones whose endangerment resulted from hunting), how to determine *which* areas to designate as critical. *See also* 16 U.S.C. § 1532(5)(C). In the second, Congress primarily addressed species whose *entire* current range would still not be sufficient to support their conservation. *See id.* § 1532(5)(A)(ii).

In any event, petitioner's argument proceeds from two erroneous premises. First, Section 3(5)(A)(i) is not plausibly read as requiring that each "specific area" contain *every* essential feature. A migratory bird may nest in one place and feed in another; an anadromous fish spawns in fresh water and matures in the ocean—but no one would say that suitable habitat must contain both fresh and saltwater. *See Home Builders Ass'n v. U.S. Fish & Wildlife Serv*, 616 F.3d 983, 988 (9th Cir. 2010) ("In vernal pool complexes, the elements necessary to species survival are present in distinct areas.").[14]

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[14] Petitioner's effort to impose an all-features requirement via the regulatory "PCEs" rather than the statute, fares no better. As noted above, the agency subsequently jettisoned the PCE concept entirely. *See* n.3, *supra*. But even under the 2012 regulations, the presence of all PCEs was not a requirement. Those regulations said the Service would "*focus on* the principal biological or physical constituent elements within the defined area." 50 C.F.R. § 424.12 (2012) (emphasis added).

Accordingly, it was the Service's longstanding practice to designate areas based on biological realities, whether or not all features or PCEs are currently present. *See, e.g.*, 73 Fed. Reg. 45,534, 45,558 (Aug. 5, 2008) (explaining that "some [designated] units contain only a portion of these PCEs"); 77 Fed. Reg. 71,876, 71,917 (Dec. 4, 2012) (designating areas that are "capable of developing the PCEs . . . that will be necessary for population growth").

Second, the statutory text nowhere directs that the standard for designating unoccupied areas must be more demanding than the occupied areas test—let alone that it be a more demanding *version* of the same test. *See* Petr. Br. 27. Rather, it stands to reason that Congress would have expected unoccupied areas to require *more* restoration than ones where the species currently lives. In any event, the statutory definition focuses on the *need* any specific area could serve, not its abstract quality.

Unoccupied area designations are rarer, *as a descriptive matter*. But that surely reflects the biological reality that a species' currently occupied areas will, in most circumstances, be a better conservation bet than an area it does not currently occupy. But that is not invariably true—and not a statutory command. If, for example, the Service were deciding whether to designate a military base on which a species is currently found or a larger low-traffic area it occupied until recently, the best science might counsel designating the latter. Indeed, the Service's 2016 regulatory revision acknowledged that the "rigid step-wise" approach followed here—where unoccupied habitat could only be considered after determining that occupied areas were inadequate—will not always be the most efficient approach or "the best conservation strategy for the species." 81 Fed. Reg. 7,414, 7,426-27 (Feb. 11, 2016).

4. This textually proper and biologically sensible understanding is on all fours with the designation of critical habitat, both occupied and unoccupied, for the dusky gopher frog in Mississippi. The Service "identified 15 ponds and associated forested uplands that [it] considered to have *restoration potential*."

76 Fed. Reg. 59,774, 59,775 (Sept. 27, 2011) (emphasis added). To the extent such areas had "all of the PCEs" at final designation, J.A. 154, that was the result of active efforts in areas that were not remotely move-in ready at the time of listing or even of initial designation. *Cf.* 75 Fed. Reg. 31,387, 31,394 (June 3, 2010) (noting that proposed Mississippi areas had "at least one of the PCEs" due to "[h]abitat restoration efforts").

Nor, lest petitioner argue otherwise, does this imply that the Act requires that all restoration be complete before designation. Not even Dr. Pangloss would say that it is *too early* for intervening in the dusky gopher frog's plight. And given the ongoing threats to habitat—and sometime irreversible character of degradation—a "wait and see" approach is biologically and statutorily irresponsible. Indeed, that is the *actual* import of Section 4(a)(3) of the Act. *See* pp. 42-49, *infra*. Recognizing Unit 1 sooner rather than later avoids actions that would unknowingly squander the area's singular conservation value and enables those concerned for the species' well-being to explore solutions that both respect "the timber management goals of the landowners and work toward[] recovery of the dusky gopher frog." J.A. 123.

C. Neither does Unit 1's private ownership mean it is not essential under the Act.

This leaves the argument that Unit 1 is inessential, not because the frog cannot live there, but rather because the owners will not let it. *See* Petr. Br. 28-29. On this reasoning, even if Unit 1 were ideal—and the last place on earth to salvage *R. sevosa* from imminent extinction—the landowners' right to exclude would in itself prohibit critical habitat designation.

As a matter of statutory text and common sense, that is untenable. Had Congress meant to restrict designations, it could have so provided. Congress plainly knows how to create an exclusion for private owners. *See, e.g.*, 54 U.S.C. § 302105(b) ("If the owner of any privately owned property . . . object[s] to . . . designation [as a National Historic Landmark], the property shall not be [designated].").

Nothing in the critical habitat provisions supports such a distinction. Ownership is not a "physical or biological feature[]" of a parcel of land, 16 U.S.C. § 1532(5)(A)(i), and whether a "specific area" is "essential for the conservation of [a] species," *id.* § 1532(5)(A)(ii), is a matter of science, not property law. Indeed, the Act could not accomplish its aim of halting extinctions were critical habitat restricted to areas owned by the federal government and private volunteers. "[A]t least 80 percent of endangered or threatened species occur either partially or solely on private lands," and "50 percent of federally listed species are not known to occur on Federal lands at all." 71 Fed. Reg. 60,238, 60,244 (Oct. 12, 2006).

In declining to draw the line petitioner seeks, Congress also rejected petitioner's underlying premise: that species conservation and private ownership are fundamentally incompatible. First, though a critical habitat designation has no effect on ownership rights, it provides immediate protection against heedless *federal* activities that might otherwise compromise Unit 1's irreplaceable ecological resources. Absent designation, the Federal Highway Administration might not think twice before financing a road-building project that paved over what appear to be a handful of unprepossessing ephemeral ponds.

Such informational benefits are, in fact, of special importance in unoccupied habitat designations, where the area's value to species conservation is almost never self-evident. And these informational benefits extend to conservationists and state and local officials who might provide financial and technical assistance aimed at preventing avoidable degradation. Indeed, such information is of value even to a hard-nosed property owner, who might want to keep open its options for monetizing the ecological value.

If, as explained above, the landowners were to pursue residential development—and were such a project to require a Clean Water Act Permit and were that permit to trigger a Section 7 consultation—there is every reason to expect that the developer's objectives and Congress's species-conservation commitment could both be realized. That is what happened with *this* species in Mississippi: A large centrally planned residential community was developed immediately adjacent to Glen's Pond, *see* AR4574, 4582, after the dusky gopher frog was proposed for listing. The Service concluded that the species would not be jeopardized, provided that a narrow strip of land next to the pond went undeveloped. *Id.* What happened on Unit 2 could happen on Unit 1. As that experience attests, conservation is viewed as a positive amenity by many home-buyers. And many federal, state, and nongovernmental resources support owners' conservation efforts. *See, e.g.*, U.S. Fish & Wildlife Serv., *Grants Overview*, https://tinyurl.com/y6wzjcbh; La. Dep't Wildlife & Fisheries, *State Wildlife Grants Program*, https://tinyurl.com/ycwm8ptj.

And even were the landowners' plans to fall into the vanishingly small class of proposed actions that are found to be irreconcilable with conservation, private conservation groups commonly seek out critical habitat to purchase at market prices, often with funds from other parties needing environmental mitigation credits. *See* Nature Conservancy, *Mississippi, Old Fort Bayou Mitigation Bank*, https://tinyurl.com/ydghsem5.

Finally, were no private party to come forward in such circumstances, federal acquisition—either by voluntary purchase, *see* 16 U.S.C. § 1534, or eminent domain, *see* 40 U.S.C. § 3113—would, as petitioner points out, be an option.[15] But as petitioner must concede, Congress did not make federal purchase a precondition to critical habitat designation. And, for the reasons just discussed and others, Congress has treated direct federal ownership as a last resort, not a first. It seldom will be necessary to purchase an entire area to obtain the needed benefits for the species, and local governments and communities usually prefer that, when possible, private, revenue-generating activity and conservation both occur.

III. Section 4(a)(3) directs designation of critical habitat, without altering its definition.

Before the court below, petitioner forthrightly recognized that the lawfulness of the Unit 1

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[15] Contrary to petitioner's assertion, Petr. Br. 42, the Act does not expressly address eminent domain; the "regulated taking" that 16 U.S.C. § 1532(3) refers to is the taking *of a species*—"in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved," *id.* Petitioner is correct that the federal government's general authority includes acquiring land for species conservation purposes.

designation is controlled by what Congress said "[t]he term 'critical habitat' . . . means." 16 U.S.C. § 1532(5)(A). *See* C.A. Br. 27, 33-36. So did the other parties and both the majority and dissenting opinions. *See, e.g.*, Pet. App. 65a (Owen, J., dissenting) ("The touchstone chosen by Congress was 'essential.'").

In this Court, petitioner argues that the Section 3 definition is only part of what the Act requires. An unoccupied area that is "essential for the conservation of the species" *may not* be designated, petitioner now contends, unless it *also* satisfies a separate requirement, imposed under Section 4(a)(3). *See* Petr. Br. 22-24. By using the phrase "any habitat . . . considered to be critical habitat" in that provision, the argument continues, Congress directed that an unoccupied area must also be "a subset" of "habitat" *id.* 22, 31, which petitioner says connotes "habitability," *id.* 25, which, it further assures the Court, means the current occurrence of every "PCE," *id.* 27. In this fashion, petitioner says, Congress "directly spoke[] to the precise question at issue [here]"—and clearly prohibited the Service from designating historical habitat that is restorable and urgently needed for species recovery. *Id.* 22 (quoting *Digital Realty Trust v. Somers*, 138 S. Ct. 767, 781-82 (2018)).

Initial consideration of this new line of argument discloses a number of significant embarrassments. And "close analysis," Petr. Br. 18, under the canonical rules for interpreting statutory text, confirms that petitioner has not struck gold, but pyrite.

1. The first—and not least—of these difficulties is utter incompatibility with the substantive judgments codified throughout the Act. As explained above, *see*

pp. 32-34, *supra*, it is not very plausible that Congress, focused on habitat curtailment, and determined to reverse species loss, "whatever the cost," would nonetheless draw the line at desperately-needed areas the Service determines to be "critical habitat," unless they also met some further requirement.

Moreover, this argument must reckon with the reality that the ostensibly "plain" "clear," "direct[]" "command," *see* Petr. Br. 4, 18, 22, 31, eluded not only the courts below, but petitioner itself. This is no mere case of failing to take note of an obscure provision in a sprawling statute. Petitioner's opening and reply briefs below discussed and even *quoted* Section 4(a)(3)—but both took the trouble to *substitute* the word "land" for "habitat." Thus, petitioner described Section 4(a)(3) as "authoriz[ing] the Service to designate *land* 'which is then considered to be critical habitat.'" C.A. Br. 38 (emphasis added); *see also* C.A. Reply Br. 11 (similar).

Even that is not all. Citations and quotations aside, petitioner advanced an interpretation of what critical habitat means that is irreconcilable with what petitioner now insists the Act plainly says. Seeking to persuade the Fifth Circuit of the lawfulness of the Service's designation of a sediment-rich, but uninhabited—and uninhabitable—area as "critical habitat" for the Santa Ana sucker, petitioner represented that Congress *did not* prohibit designating "land that is unsuitable as habitat." C.A. Br. 28-29. And, petitioner further explained, it *"is not* strictly necessary" under the Act that "every [unoccupied] area designated as critical habitat

contain all essential habitat elements." *Id.* (emphasis added).[16]

2. The truly fatal problems, however, for petitioner's (revisionist) reading of Section 4(a)(3), derive from the text of the provision and its "place in the overall statutory scheme," *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

Section 4(a)(3) is a "command," Petr. Br. 3, to be sure, but the "precise question" it directly addresses, *id.* 22, is *when* to designate areas "considered to be critical habitat." And its command is to do that promptly, *i.e.*, "concurrently with" listing, not at some later date, a directive reinforced with words like "shall" and "maximum" and "any." Indeed, the scores of decisions construing the much-litigated provision have all understood that to be provision's domain. Respondent-intervenor Center for Biological Diversity, having been party or counsel in many such cases, is aware of no decision that has even hinted that Section 4(a)(3) also contains a *negative* command, housed in an occult meaning of "habitat," that substantively restricts *which* areas the Service shall designate.

3. And petitioner's theory takes no account of *Section 3(5)(A)'s* place in the overall statutory scheme. A Congress intent on prescribing *what* areas, occupied or unoccupied, the Service should and may not designate "critical habitat" would do so through a

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[16] When that designation was litigated, the Ninth Circuit echoed petitioner's Fifth Circuit position, finding "no support" "in the text of the ESA or the implementing regulation," for requiring that an area that is essential also be "habitable." *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015), cert. denied, 136 S. Ct. 799 (2016).

provision settling what "critical habitat "means" for purposes of the Act. That is what Congress *did* do, in the same 1978 legislation that also enacted Section 4(a)(3). A legislature known for not "hid[ing] elephants in mouseholes" would not, while debating and ultimately codifying a statutory definition, tuck a distinct limitation in a provision commanding that the Service speed up critical designations. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).[17]

4. If the 95th Congress *had* in fact harbored the specific restrictive intent for Section 4(a)(3) that petitioner claims for it, it would have made no sense to express its all-PCEs-now requirement by simply dropping the word "*habitat*," undefined, into Section 4(a)(3), and then counting on the Service to glean its restrictive meaning. As petitioner's brief and many others attest, "habitat" is "a word of many, too many, meanings," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998), to function as a term of limitation.

Within the Act itself, the word is used variously—in ways inconsistent with one another and with the highly particular understanding petitioner says is "the" meaning. Section 8a(e)(2)(B), for example, requires international cooperation in identifying "habitats upon which [migratory birds] depend." 16 U.S.C. § 1537a(e)(2)(B). A stopover along a migration

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[17] Tellingly, although petitioner places heavy reliance on individual floor statements and other arcana from the Act's legislative history to make the case that "Congress" did not intend expansive designations, see Petr. Br. 31-32, these chosen snippets invariably refer to *Section 3(5)(A)—i.e.*, the "definition," Leg. Hist. 1121 (Rep. Murphy) (quoted in Petr. Br. 32). None addresses Section 4(a)(3), let alone alludes to the independent restrictive intent petitioner now claims for that provision.

route rarely contains all characteristics required to sustain the totality of a bird's life-history processes. But such areas constitute "habitat" under the Act—and indeed, regularly are designated critical habitat. *See* p. 35, *supra*; *cf. Ariz. Cattle Growers Ass'n*, 606 F.3d 1160, 1165-66 (9th Cir. 2010) (explaining that equating "occupied habitat" with areas where a species resides "would make little sense as applied to nonterritorial, mobile, or migratory animals").

And as discussed, the listing provision, Section 4(a)(1)—which is Section 4(a)(3)'s close neighbor—references "present" "destruction, modification, or curtailment" of an endangered species' "habitat." 16 U.S.C. § 1533(a)(1). This statutory recognition of "habitat" of a species that is "modif[ied]" at "present" is at sharp odds with the notion that the word "habitat" of its own force excludes areas needing restoration.

Most conspicuously, in Section 3(5)(A)(ii), Congress departed from what likely is the most familiar meaning of the word, when it provided that "critical habitat" is *not*, for purposes of the Act, limited to the "place[s] where [the] particular species of animal or plant is normally found," *Habitat*, Black's Law Dictionary (10th ed. 2014), but instead includes places "outside the geographical area occupied [in even a broad sense] by the species." 16 U.S.C. § 1332(5)(A)(ii).

Petitioner, recognizing this incompatibility, simply omits that dictionary definition from its brief, *compare* Pet. App. 134a (Jones, J., dissenting), but the damage

to its "ordinary meaning" claim is not so easily cordoned off.[18]

5. Indeed, petitioner's "subset" theory, *see* Petr. Br. 31, derives its plausibility from reading the Act as if the express definitional provision did not exist. If Congress had enacted a provision directing the Service to make grants, promptly, to "such states that are considered to be participating states," it would be reasonable enough to argue that Guam was not a "state" and thereby ineligible. But if Congress had contemporaneously enacted *another* provision defining "participating states" to include "territories of the United States," it would be unnatural to conclude Guam was excluded, on the ground that "Congress required *both*," *see* Petr. Br. 22, that a grantee be a "participating state" and that it satisfy the "ordinary meaning" of "state."

6. But petitioner's theory is not merely far-fetched. It is wrong and, if adopted, would subvert the important work that Section 4(a)(3) actually was enacted to accomplish.

a. Petitioner cannot dispute that the definition of "the term 'critical habitat'" was enacted to clarify the predicate for Section 7 consultations—federal actions modifying "habitat of [endangered] species which is determined by the Secretary . . . to be critical." 16 U.S.C. § 1536(a)(2). The full equivalence of the two terms was widely recognized soon after the statute's

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[18] The definitions that petitioner does include reinforce how diversely and broadly the term is used. *Compare* Petr. Br. 24 ("[T]he place or type of site where an organism or population naturally occurs"), *with id.* (an area containing "physical and biologic factors which provide at least minimal conditions for one organism to live").

enactment. *See, e.g.*, *Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359, 371 (5th Cir. 1976) (explaining that Section 7 "imposes on federal agencies the mandatory duty to insure that their actions will not . . . destroy or modify *critical habitat* of an endangered species") (emphasis added); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1301 n.37 (8th Cir. 1976) (same). In fact, their equivalence was established *before* enactment. *See* H.R. Rep. No. 93-412, at 14 (1973) (describing "destruction of critical habitat of those species").

This Court's decision in *Hill* used the Section 7 language and "critical habitat" fully interchangeably. In fact, the Court said that "the Act does not define 'critical habitat,'" but added that "the term"—by which it meant the Section 7(a)(2) phrase—had been "administratively construed." 437 U.S. at 160 n.9.[19] So

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[19] Petitioner goes wholly off the rails when it suggests that the Court's opinion in *Hill*, by using the word "habitat," somehow announced petitioner's restrictive meaning. Petr. Br. 30. Nothing in that case turned on the meaning of "critical habitat," let alone unoccupied critical habitat; completing the dam project would have destroyed the species in the only place it was known to live. To the extent the Court addressed the meaning of "critical habitat," it quoted—with approval—the "administrative definition" that, on petitioner's telling, Congress later disapproved. *See* Petr. Br. 8-9.

But petitioner gets the enactment history wrong also. Although Congress responded to *Hill*'s substantive holding (and apparently was concerned by the regulation's potential application in *occupied* areas, *see* 16 U.S.C. § 1532(5)(C)), the *unoccupied* habitat component of the statutory definition is *broader* than was the regulatory one—which referenced only "additional areas for reasonable population expansion," 43 Fed. Reg. 874, 875 (Jan. 4, 1978), and arguably looked only to species' "survival," rather than "conservation." *See Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441 (5th Cir. 2001) ("'Conservation' is a much broader concept.").

when Congress settled what "'critical habitat' . . . means" it assuredly contemplated the areas for which Section 7 consultations would be required.

b. Against this background, the burden of petitioner's argument is that Congress intended the phrases "*habitat* . . . considered to be *critical habitat*" in Section 4(a)(3) and "*habitat* determined . . . to be *critical*" in Section 7(a)(2) to mean different things. As a descriptive matter, that is unlikely: What surely happened is that Congress, having answered in Section 3 what the Section 7 phrase meant, did not take the trouble to re-write *that* provision's language; but, in drafting the new concurrent designation directive, it picked up the newly minted statutory term.

c. If credited, petitioner's "surplusage" argument would wreak substantive mischief, because the areas for which Section 7 consultations are required would then be different from those the Secretary must designate under Section 4. *That* regime would defeat a principal, actual reason for Section 4(a)(3)'s enactment: to ensure that critical habitat is identified early and rigorously, well before any potentially incompatible federal project gets too far along.

7. In reality, the meaning of "*habitat* considered to be . . ." is clear from the context—it is not surplusage. Rather, that statutory word is "given effect," Petr. Br. 23—its intended, albeit innocuous, effect—by construing it as a synonym for "land" (or for the term "area" in Section 3(5)(A)). That is how petitioner understood the word when it substituted "land" for "habitat" in describing Section 4(a)(3)'s operation to the court below. *See* C.A. Br. 38. There is no "canon of interpretation that forbids interpreting different

words used in different parts of the same statute to mean roughly the same thing." *Jennings v. Rodriguez*, 138 S. Ct. 830, 845-46 (2018) (citation omitted).

IV. Petitioner's non-textual arguments for narrowing the statute also fail.

With no credible foothold for its desired requirement in the statute Congress enacted, petitioner devotes much ink to asking this Court to impose one anyway, lest the absence of a "limiting principle" allow designating critical tropical bird habitat in Alaska and the like. *See* Petr. Br. 37. The judiciary has no free-floating power to "improve upon" the statutes Congress enacts, *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014). But if it did, there would be no warrant for its exercise here. "[L]ike most apocalyptic warnings, [petitioner's] proves a false alarm." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018). Nor does constitutional avoidance do the trick.

A. There is no policy justification for restraining the designation process Congress established.

Petitioner's supposition that the process needs reining in mistakes the fundamentals of the Act's design and real-world operation.

1. When the Service promulgated a regulation, designating Unit 1 (and other areas) as critical habitat, it was not announcing a general "one-feature-suffices" rule for designations going forward, such that a yard with an "[i]ndividual tree[]" might be next up. Petr. Br. 38 (quoting Pet. App. 155a-56a). The agency was concluding, based on the scientific data, that *these* areas are essential for the conservation of *this* species.

That is, by statute, how every designation occurs—species-by-species, area-by-area, with rigorous, independent input and maximal rights of participation for interested parties. (This rule was the culmination of three rounds of notice and comment, a public hearing, and an economic analysis.)

Of course, designations *are* constrained, by the requirements Congress specified: An unoccupied area may be designated critical habitat *only* if it is, as a matter of scientific judgment, "essential for the conservation of [a] species." 16 U.S.C. §§ 1532(5)(A)(ii), 1533(b)(2). A fair application of that standard would plainly rule out the hypothetical—and entirely fanciful—designations petitioner would have the Court worry over. No all-PCEs-right-away restriction is required to prevent the Service from proposing to "raze[] a "cit[y]," Petr. Br. 37; and if any such critical habitat were ever proposed, no peer reviewer—or reviewing court—would sign off. In this case, for instance, the Service was (eventually) persuaded of the great value of additional breeding sites within the species' historic range but outside of Mississippi. But even that (correct) understanding, in conjunction with the agency's supposedly exaggerated focus on ponds, did not prevent it and its scientists from refusing designation of the more than 60 ponded areas it identified within the frog's historic Alabama range. J.A. 159.

2. Petitioner's narrative of agency overreach loses plausibility when considered in light of the critical habitat program's actual administration over the past four decades. Notwithstanding the statutory concurrent designation mandate, critical habitat designations have lagged far behind listings. *See* Tara

G. Martin, *Timing of Protection of Critical Habitat Matters*, 10(3), Conservation Letters 308-16 (2017). And courts have repeatedly faulted the Service for impermissibly narrow understanding of its responsibilities. *See, e.g.*, *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 443 (5th Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004). And this administrative reticence is by all accounts linked to "constant political pressure [from] the congressional authorization and appropriations processes" in this area. Antonin Scalia, *Responsibilities of Regulatory Agencies under Environmental Laws*, 24 Hous. L. Rev. 97, 107 (1987). *See, e.g.*, *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1182-84 (10th Cir. 1999) (describing appropriation riders restricting, and in some instances prohibiting, critical habitat designations).

B. The Service's exercise of its designation responsibility raises no serious constitutional question.

Nor, contrary to petitioner' contention, is "constitutional avoidance" an available means for grafting its desired restriction onto the statute. *See* Petr. Br. 32-35. Petitioner seeks to deploy that doctrine in novel fashion, unmoored from its origins in principles of judicial restraint. But even under the standard rules, which require both a "gravely [doubtful]" constitutional question, *Almendarez-Torres v. United States*, 523 U.S. 224, 239 (1998), *and* a "plausible statutory interpretation[]," *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018), it could not succeed.

1. There is no constitutional question here, serious or otherwise. The Service did not, through

designation, assert "jurisdiction over the land and water in Unit 1." Markle Br. 37. Indeed, Section 4(a)(3) does nothing in itself—it simply places an area on a list in the Federal Register. The only operative provision triggered is Section 7, which regulates only federal actors. *See* 16 U.S.C. § 1536(a)(2) (addressing "any action" of "[e]ach Federal agency"). Because Congress needs no special grant of authority to regulate the federal government or impose limits on federal activities it has authorized, *see Gonzales v. O Centro Espirita Beneficente U.D.V.*, 546 U.S. 418, 424 n.1 (2006), there is no Commerce Clause issue to avoid.

And the courts of appeals are in any event unanimous that Section 9 of the Act, which directly regulates private party actions (including adverse habitat modification) on private lands, is within the Commerce Power, including when applied to "intrastate, non-commercial species." *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 641 (5th Cir. 2003). *See generally People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 1002, 1007 (10th Cir. 2017) (collecting decisions), *cert. denied*, 138 S. Ct. 649 (2018).

2. This case differs from ones where the avoidance canon is usually applied, in that the supposed constitutional problems the plain-language construction produces did not induce petitioner to present them to this Court, despite having maintained throughout that the designation was unconstitutional. Whether this deliberate choice to keep actual constitutional claims from the Court should render "avoidance" arguments inoperative, it at least raises an inference that petitioner adjudged these "constitutional" issues of greater value as a spectral

presence in this case than as an actual one. *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) ("[L]awfulness under the Constitution is a separate question to be addressed in a constitutional challenge.").

Finally, if there were any constitutional significance to whether an endangered species is "intrastate," that distinction should not benefit petitioner's constitutional (or semi-constitutional) arguments here. Until the relatively recent past, the dusky gopher frog was not "an intrastate species," Markle Br. 37, but a multi-state one. It seems most implausible that 1965 was a fateful year not just for Louisiana frogs but for Congress, too—that its authority to enact protective legislation would wither once habitat curtailment has pushed a species to a single state.

V. There is no basis for setting aside the critical habitat designation on economic grounds.

For all the overwrought claims of judicial "abdicat[ion]," Petr. Br. 45, petitioner's second question presented is not really about "reviewability" in the abstract. It is instead about the particular *kind* of judicial review that petitioner seeks. Congress did not authorize courts to overturn critical habitat *designations* on economic grounds. And the decision here construed the Act properly—to deny petitioner's effort to raise at the (non-exclusion) back door a claim that Congress forbade it to press at the front.

1. For all the unreviewability talk, petitioner recognizes, the "decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include*" it. Petr. Br. 49 (quoting Pet. App. 160a n.21 (Jones, J.,

dissenting)). And *that* decision is fully reviewable under the Administrative Procedure Act; indeed, this Court is the third to consider petitioner's claims that the Unit 1 designation exceeded statutory bounds or was arbitrary and capricious. (And were there any claim that the Service did not rely on the best science or take account of economic impacts, those claims would be cognizable too. *See Bennett v. Spear*, 520 U.S. 154 (1997).) But this Court made clear from the inception of the Act that a reviewing court *may not* entertain a claim to set aside a lawful critical habitat designation on cost grounds. In *Hill*, the Court highlighted the "obvious[] . . . difficult[y] for a court to balance the loss of a sum certain—even $100 million—against a congressionally declared 'incalculable' value." 437 U.S. at 187-88. But it said that to introduce the dispositive point: that Congress, as a substantive matter, had "emphatically" denied courts any power "to engage in such a weighing process." *Id.*

2. That emphatic judgment was not overruled when Congress amended the statute in 1978, requiring the Service to "tak[e costs] into consideration," 16 U.S.C. § 1533(b)(2), in making designations. To be sure, Congress thereby hoped "to avoid needless economic dislocation," *Bennett*, 520 U.S. at 176, but it specified the way that purpose is to be pursued—through the *process* of agency consideration itself, not through a judicially vindicable right to cost-justified designations. There is nothing anomalous about that approach. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (explaining that NEPA process "prohibits uninformed—rather than unwise—agency action"). And having held the line against judicial cost-benefit review of designations, it would make zero sense, as the decision below

recognized, for Congress to have finally authorized it in the guise of "abuse of discretion" review of the Service's *non-exercise* of its discretionary Section 4(b)(2) authority to exclude.

3. Nor does petitioner's alternative—and contradictory—argument, that the Court must treat the "single, unitary" decision as two separate ones, Petr. Br. 49, get petitioner the traction it seeks. To be sure, it would be troubling to hold nonreviewable a refusal to exclude a parcel that was based on the "religion of its owner," Markle Br. 49. But the decision below would not require that. In that hypothetical case, the Service's entire decision would be "final agency action," 5 U.S.C. § 704, and could be set aside on the ground that the last (non-exclusion) step was "contrary to constitutional right," *id.* § 706—or not based on the "best scientific data." In fact, if there really were two separate decisions—one to designate and the other to not exclude—and invidious prejudice infected only the latter, the proper remedy would be to *leave intact* the lawful critical habitat designation and only remand, to an unbiased agency official, the tainted non-exclusion decision. *Cf. Buck v. Davis*, 137 S. Ct. 759 (2017) (remanding for potential resentencing, not re-trial, based on racially invidious testimony in penalty phase).

4. Petitioner claims that if agency decisions *to exclude* are reviewable, then fairness requires courts perform the "same analysis" when "the Service ultimately decides . . . not to exclude." Petr. Br. 49-50. But this misunderstands courts' grounds for reviewing decisions to exclude. Such decisions are reviewable not because of the "*may*" language in Section 4(b)(2)'s second sentence, but because of the "*shall*" in the first.

A decision to exclude is "properly reviewable because it is equivalent to a decision not to designate critical habitat," *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 990 (9th Cir. 2015), which may be set aside as "not in accordance with law." If exclusion decisions were truly unreviewable, the Service could simply announce that critical habitat designations are always too costly, in derogation of Congress's substantive judgment. *Cf. Nat. Res. Def. Council v. U.S. Dep't of the Interior,* 113 F.3d 1121, 1126 (9th Cir. 1997) (rejecting the Service's expansive interpretation of its authority to deem designation "imprudent").

Indeed, in cases like this one, involving a species whose occupied habitat is specifically determined to be inadequate, it would be hard to imagine how an exclusion could be upheld—at least absent strong evidence that the biological benefits of designation were being achieved through other means. That, in practice, is how the Service generally has understood its exclusion power—not as authority for wholesale trade-offs of species conservation for economic benefit, but rather as a means to reward and encourage parties willing to take serious species-protective measures. *See, e.g.*, 78 Fed. Reg. 344, 389 (Jan. 3, 2013) (excluding areas from the critical habitat designation, citing existing "resource management plans [and] conservation plans"); 77 Fed. Reg. 72,070, 72,101 (Dec. 4, 2012) (similar).

5. "Reviewability" turns out to be the banner under which petitioner advances a far more ambitious proposal—one that seeks to second-guess the agency's core substantive decision. Review under the actual APA standards would be of no help to petitioner. The non-exclusion here was undeniably within the

Service's congressionally conferred discretion; and the Service's reasoning is manifest and manifestly rational, encompassing not only its brief statement of that decision, but its specific, unchallenged findings about this species' urgent needs and the "congressionally declared 'incalculable' value," *Hill*, 437 U.S. at 188, of preventing extinctions generally. (Indeed, given the breadth of the Service's discretion and the premise that insufficiently explained non-exclusions do not impugn proper designations, it is hard to imagine such claims' ever satisfying the APA's "prejudicial error" requirement. *See* 5 U.S.C. § 706.)

CONCLUSION

For the foregoing reasons, this Court either should hold that dismissal of petitioner's suit for lack of jurisdiction is required or, in the alternative, should affirm the judgment.

Respectfully submitted,

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